

Important Things to Know Before You File An Arbitration

BASIS FOR ARBITRATION

Duty and Privilege to Arbitrate

Arbitration is not unique to organized real estate. Several other groups of professionals as well as companies and individuals use arbitration to resolve their disputes. When a real estate licensee joins a local association, he or she is entitled to the rights and benefits of REALTOR® membership. However, he or she is also bound by the obligations of membership, such as agreeing to abide by the Code of Ethics. Article 17 of the Code of Ethics is one of the cornerstones of organized real estate and it contains the REALTOR® obligation to use arbitration to resolve disputes.

While only REALTORS® are bound to abide by the Code of Ethics, real estate licensees who participate in the MLS also agree to abide by the MLS rules and regulations. The California Model MLS Rules, which most MLS's in California use, require participants and subscribers to arbitrate disputes that arise from listings on the MLS. Therefore, even if a real estate licensee is not a member of the local association, he or she may nonetheless be obligated to arbitration by being a participant or subscriber in a MLS.

The Association Member's Arbitration Agreement

Arbitration by its nature is contractual. That is, parties to arbitration agreed through some type of contract to be obligated to arbitration. In addition, parties may agree to arbitrate disputes either before or after the dispute arises. In California, arbitration agreements must generally be in writing to be enforceable. A local association member's written agreement to arbitrate exists by virtue of:

- The signed membership application;
- The agreement to abide by the Association's Bylaws; and
- The agreement to abide by the Code of Ethics, specifically, Article 17.

While the agreement to arbitrate exists when an individual joins the Association, this agreement is repeated on the arbitration complaint and response forms. **However, refusing to sign an arbitration complaint or response does not alter the existing arbitration agreement. If a member fails to sign either form, the obligation to arbitrate still exists.** Members also agree to arbitrate disputes with their clients, provided the client agrees to binding arbitration using the Association. Because a member's client has not previously agreed to arbitrate, the client's agreement to arbitrate is contained in the client of member arbitration complaint form (Form PA-1). This form also binds the client to comply with the arbitration award. Therefore, unlike a member, a client must complete and sign Form PA-1 in order to be bound by arbitration using the Association facilities.

Although Association membership is individual, many firms operate their real estate business under a corporation or other business entity. Sometimes, members attempt to use the corporation as a shield to avoid their arbitration responsibilities. However, the membership application provided by C.A.R. and Section 42(a) of the California Code of Ethics and Arbitration Manual states that the member binds him or herself and the corporation for which he or she acts to arbitration. Furthermore, the California Model Bylaws also contain a similar section making this clear. Even so, an association may find it helpful to request that a member submit a corporate resolution specifically authorizing the member to bind the corporation to arbitration. Preferably, this should be done at the time of the arbitration complaint or response is filed, but it may be done at any time prior to the arbitration.

Often, members enter into separate agreements (such as in the listing agreement or a buyers' broker agreement) to arbitrate a dispute somewhere other than at the Association. This is perfectly legal and ethical and the Association should treat this agreement as superseding any agreement the member may have to arbitrate the particular dispute at the association. Sometimes a member will attempt to bypass the arbitration process by filing a civil lawsuit against another member. If a member does this, the respondent member can request the court to compel arbitration at the local association in accordance with the arbitration agreement. However, if the respondent member fails to request the court to compel arbitration and responds to the civil lawsuit, the parties are effectively waiving their right and obligation to arbitration at the local association. Furthermore, neither member is in violation of Article 17.

The MLS Participant's or Subscriber's Arbitration Agreement

Assuming the MLS rules include a rule requiring arbitration, a MLS participant's or subscriber's written agreement to arbitrate exists by virtue of:

- The signed MLS application;
- The agreement to abide by the MLS rules and regulations.

While the agreement to arbitrate exists when an individual joins the MLS, this agreement is repeated on the arbitration complaint and response forms. However, refusing to sign an arbitration complaint or response does not alter the existing arbitration agreement. If a member fails to sign either form, the obligation to arbitrate still exists. A person who is not a member of any local association but who is a participant or subscriber in a MLS will have an obligation to arbitrate disputes regarding listings in the MLS with other participants or subscribers of that MLS. Therefore, even if the participant or subscriber is not a member of a local association, the person may nonetheless be obligated to arbitrate disputes regarding listings on the MLS with the members of the local association who participate in the MLS. And, likewise, members of the local association will also have an obligation to arbitrate with the participant or subscriber.

Disputes Arising Out of the Real Estate Business

Members are not required to arbitrate all disputes with other members, only those that "arise out of the real estate business." As a general guideline, the types of disputes that arise out of the real estate business are those that arise between members when acting in the capacity of their real estate licenses and that involve monetary disputes, such as a procuring cause dispute over a commission. If a member objects that the matter does not "arise out of the real estate business," the matter is still referred for a hearing and the arbitrators will make that determination. However, in some cases, a dispute may be submitted for arbitration that clearly did not arise out of the real estate business. In these situations, the association may consult with legal counsel and refuse to accept the arbitration complaint.

With respect to MLS participants and subscribers, they agree to arbitrate disputes that not only arise out of the real estate business but they must be in conjunction with a listing filed on the MLS.

Disputes with the Public and Clients

In general, members are not obligated to arbitrate disputes with the general public. However, members are obligated by Article 17 to arbitrate contractual disputes with their clients provided the client agrees to submit the dispute to the association and agrees to be bound by the arbitration award. With respect to MLS participants and subscribers, they are not obligated to arbitrate with the general public or their

clients. In order for the member to be obligated to arbitrate a dispute with his or her client, three elements must be met:

- The dispute must arise from an agency relationship between the client and member;
- The dispute must be a contractual dispute; and
- No superseding arbitration agreement exists between the member and the client (i.e. arbitration agreement in a listing or buyers' broker agreement that indicates arbitration will occur somewhere else).

To give some examples, a member who represented a seller exclusively in a real estate transaction is not obligated by their arbitration agreement under the association's rules and procedures to arbitrate a dispute with a buyer regarding the transaction. However, if the member was a dual agent in the transaction and represented both the buyer and seller, the member would be obligated to arbitrate the dispute with the buyer, provided the buyer agreed to submit the dispute to the association and be bound by the arbitration award. In both of these examples, a real estate licensee who is only a MLS participant and subscriber would not be obligated to arbitrate with the client.

Associations frequently receive requests from the public to arbitrate with the association's members and MLS participants and subscribers. Prior to processing a complaint, the association should make sure that the member is otherwise obligated to arbitrate the dispute. If not, the complaint should not be processed.

Timing of the Dispute

In general, as long as the facts and circumstances giving rise to the dispute occurred while the licensee was a member of the local association or a participant and subscriber in the MLS, the licensee will be obligated to arbitrate the dispute if it otherwise meets the requirements for arbitration. The obligation to arbitrate cannot be avoided by simply resigning from the local association or MLS.

Sometimes, a member may hold membership in several different local associations. In this situation, another member can file a complaint at any association where the other member holds membership or the association where both members hold common membership. Also, if both members belonged to the same association at the time the dispute arose, and then one member subsequently resigned and joined a different local association, the arbitration could be held at either local association.

INITIATING THE ARBITRATION COMPLAINT

Invoking Arbitration

To invoke arbitration at a local association, a written arbitration complaint (Form PA-1 or A-1) must be filed with the local association. Once a complaint is filed, the association will need to process the complaint to make sure the person filing the complaint and the persons named as respondents in the complaint are required to arbitrate the dispute at the local association. The local association is only required to accept arbitration complaints involving mandatory arbitration situations and may reject complaints where the parties are not obligated to arbitrate through the association.

There are two exceptions to the general obligation of members to arbitrate disputes with other members.

- a.** If the members are or were affiliated with the same firm at the time the dispute arose (i.e. an interoffice dispute), the members are not obligated to arbitrate the dispute and the association is not required to provide arbitration unless all parties agree to the arbitration.

b. If the members have agreed to submit a dispute to another association forum (for example, the American Arbitration Association), with respect to that dispute, the association should treat this as an arbitration agreement that supersedes their previous arbitration agreement with the association. In these situations, the association may refuse to process an arbitration complaint because there is a separate agreement to arbitrate before another forum.

Association's Right to Decline Arbitration

Occasionally, a dispute submitted for arbitration may meet the basic filing requirements but the substance of the dispute will be legally complex and or involve a significant amount of money in dispute. In these situations, the association has the right to decline arbitration as too legally complex or because of the magnitude of the amount involved and release the parties from their obligation to arbitrate at the association.

Usually, a matter is considered too legally complex when the dispute involves a legal issue that is beyond the training of the arbitration hearing Panel. For example, a party may claim alleged illegal advertising practices by another member that have caused monetary damages to the member. Since most hearing Panels are not trained to address claims of illegal advertising, the matter could be dismissed as too legally complex.

With respect to the magnitude of the amount involved, there are no set rules for when an association can decline on this basis. However, the association should not be deterred from handling an otherwise standard dispute arbitrated by the association (i.e. a procuring cause commission dispute) simply because the amount in controversy happens to be larger than past disputes.

The procedures for declining an arbitration based on legal complexity or the magnitude of the amount involved are contained in Section 44 of the California Code of Ethics and Arbitration Manual. Under this Section, if the hearing Panel feels the dispute should not be arbitrated based on one of these grounds, it shall make a recommendation to the Board of Directors to this effect. Also, if a hearing Panel has not yet been convened, upon reviewing the complaint and response, the Professional Standards Committee Chairperson and legal counsel representing the association may jointly recommend to the Board of Directors that the matter not be arbitrated.

In either of the situations above, the Board of Directors reviews the recommendation. If the Board of Directors concurs, the matter is dismissed and all parties are relieved of their obligation to arbitrate. They may then pursue other remedies, such as filing a court action or arbitrating before another arbitration forum. If, however, the Board of Directors disagrees with the recommendation, the matter will be referred back to the Professional Standards Committee for hearing before a new hearing Panel.